Supreme Court, U.S.
FILED
JUN 17 1993
OFFICE OF THE CLERK

(3)

No. 92-1868

In The

Supreme Court of the United States

October Term, 1992

SEA-LAND SERVICES, INC.,

Petitioner,

vs.

CLARENCE F. TINSLEY and MARION TINSLEY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

RONALD J. BLAND
LEVINSON, FRIEDMAN, VHUGEN, DUGGAN & BLAND
600 University Street
Suite 2900
Seattle, WA 98101
(206) 624-8844
Attorney for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

1. Should the Supreme Court grant a Writ of Certiorari to review the Court of Appeals' conclusion that the primary duty rule was, as a matter of law and fact, inapplicable to the instant case?

2. In this seaman's personal injury case tried to the District Court in Admiralty, was the District Court clearly erroneous in apportioning liability 90% to Sea-Land Service and 10% to Clarence Tinsley?

3. Did the District Court's award of postjudgment interest on damages from the date of initial entry of judgment, rather than from the date of hearing on partial remand on an unrelated issue, contravene this Court's decision in *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 110 S.Ct. 1570, 108 L.Ed.2d 842 (1990)?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

CITATIONS OF OPINIONS AND JUDGMENTS BELOW 1

INTRODUCTION 1

STATEMENT OF THE CASE 4

SUMMARY OF ARGUMENT 6

ARGUMENT 7

1. The Primary Duty Rule is Inapplicable 7

2. Sea-Land Only Seeks To Overturn the District Court's Factual Findings Which Were Affirmed by the Ninth Circuit, Therefore, the Petition for Writ of Certiorari Should be Denied 9

3. The Ninth Circuit's Decision is Thoroughly Consistent with *Kaiser Aluminum & Chemical Corp. v. Bonjorno* 10

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES:

Bonjorno v. Kaiser Aluminum & Chemical Corp., 518 F.Supp. 102 (1981) 10, 11

California Home Brands, Inc. v. Ferrieira, 871 F.2d 830 (9th Cir. 1989) 7

Columbia Metal Culvert Company, Inc. v. Kaiser Aluminum & Chemical Corp., 579 F.2d 20 (3rd Cir. 1978) 10

Cordero v. DeJesus-Mendez, 922 F.2d 11 (1st Cir., 1990) 12

Ferguson v. Moore-McCormack Lines, 352 U.S. 521 (1957) 9

FDIC v. Rocket Oil Co., 865 F.2d 1158 (10th Cir. 1989) 11

H. J., Inc. v. Flygt Corp., 925 F.2d 257 (8th Cir. 1991) 12

Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827, 110 S.Ct. 1570 (1990) 6, 7, 10

Tinsley v. Sea-Land Corp., 979 F.2d 1382 (9th Cir. 1992) 7, 12

U.S. Fire Ins. Co. v. Allied Towing Corp., 966 F.2d 823 (4th Cir. 1992) 9

United States v. Johnson, 268 U.S. 220 (1925) 9

FEDERAL STATUTE

28 U.S.C. §1961 12

TREATISES

Wright, Miller & Cooper, *Federal Practice and Procedure*, Section 4004 (1977) 9

CITATIONS OF OPINIONS AND JUDGMENTS BELOW

All of the opinions and judgments below are contained in Petitioner's Appendix to its Petition for a Writ of Certiorari. These include the District Court's Findings of Fact and Conclusions and Law in *Clarence F. Tinsley, et ux. v. Sea-Land Corporation,* No. C88-190T, Meg. Op. (W.D. Wash. March 27, 1989); the United States Court of Appeals for the Ninth Circuit's First Opinion in this matter, *Clarence F. Tinsley, et ux. v. Sea-Land Corporation,* No. 89-35278, Mem. Op. (9th Cir., October 29, 1990); the District Court's Supplemental Findings of Fact and Conclusions of Law; *Clarence F. Tinsley, et ux. v. Sea-Land Corporation,* No. C88-190 JET, Mem. Op. (W.D. Wash. May 29, 1991); the United States Court of Appeals for the Ninth Circuit's Second Memorandum Opinion, *Clarence F. Tinsley, et ux. v. Sea-Land Corporation,* No. 91-35762, Mem. Op. (9th Cir., Nov. 20, 1992); the Ninth Circuit's Published Opinion on the interest issue, *Clarence F. Tinsley, et ux. v. Sea-Land Corporation,* 979 F.2d 1382 (9th Cir., 1992); and the Ninth Circuit's Order Denying Petitioner's Request for a Rehearing or a Rehearing En Banc; *Clarence F. Tinsley, et ux. v. Sea-Land Corporation,* No. 91-35762, Order (9th Cir., Feb. 16, 1993).

INTRODUCTION

Petitioner's brief incorporates virtually the same arguments unsuccessfully advanced by Sea-Land first in the trial court in March of 1989, (Appendix at p. 1, hereafter simply "A-1"), second, in the Ninth Circuit Court of

Appeals (see Memorandum Decision rendered October 29, 1990 affirming the District Court's findings on damages and unseaworthiness, but remanding on comparative negligence) (A-13), third, on petition for rehearing before the Ninth Circuit denied December 27, 1990, fourth, at the remand hearing held in District Court (Supplemental Findings and Conclusions entered May 29, 1991, assessing 10% comparative fault set forth at A-37), fifth, before the second and separate Ninth Circuit panel which affirmed the trial court's supplemental findings in two separate opinions, the first on comparative fault set forth at A-47 and the second on interest set forth at A-61 issued on November 20, 1992, and, sixth, on petition for rehearing before the second Ninth Circuit panel denied February 16, 1993 set forth at A-71.

Sea-Land then waited until the very last day, May 18, 1993, to file its Petition for Certiorari raising in substance the same flawed arguments, to-wit: (1) that somehow because plaintiff was the chief officer on the Sea-Land container vessel and did not report the unseaworthy condition to Sea-Land's shoreside officials, he should bear all or most of the fault (as opposed to the 10% assessed by the trial court on remand); and (2) that notwithstanding the fact that plaintiff's total damages were definitively established by the trial court at the conclusion of the trial on March 24, 1989 (A-1) and affirmed by the Ninth Circuit on October 29, 1990 (A-13), plaintiff should not be entitled to interest until May 29, 1991, the date when the trial court entered its supplemental finding on remand of 10% comparative fault (A-34).

The only finding of comparative fault on plaintiff's part was the Ninth Circuit's conclusion that "Tinsley was

negligent in failing to report that climbing to the third tier was unsafe without a catwalk." (A-28). Despite the fact that the burden of proving comparative fault at all times rested squarely on Sea-Land, Sea-Land offered no evidence as to whether or not any other seaman including the four fellow crew members who testified as to the danger posed by the absent catwalk, ever reported the danger.

The reason why no permanent catwalk was installed at the third tier at the No. 4 hatch where plaintiff fell was not because Sea-Land did not know of the problem. As pointed out by the Ninth Circuit in its second memorandum opinion (A-47, at A-54):

> At trial, William Prindiville, Sea-Land's region manager of Fleet Operations, testified that permanent catwalks were a 'continuous maintenance problem' and were not worth installing simply because they might be needed on a few voyages a year.

Based upon the Prindiville testimony it might well be argued that the trial court's 10% reduction for comparative fault was too much rather than too little. Clearly these issues must lie within the province of the trial court and certainly not in the province of the Supreme Court.

Because all of the arguments advanced by Sea-Land in its petition have been exhaustively discussed and rejected by two separate Ninth Circuit panels in three separate and comprehensive opinions set forth in petitioner's Appendix beginning at pages A-13, A-47, and A-61, respectively, Tinsley does not believe that any worthwhile purpose would be served by attempting to respond in detail to the lengthy petition. The flaws were

obvious to the Ninth Circuit and we believe they will be equally obvious to the Supreme Court. Enough is enough!

Finally, we point out that Sea-Land, following the Supreme Court's rejection of its motion for stay of mandate on March 11, 1993, paid the judgment in full.

STATEMENT OF THE CASE

On March 27, 1989, following a bench trial, the District Court found as a matter of fact and law that:

> [T]here was no catwalk affixed to the stacking frame supporting the vans on the third tier of hatch #4 which rendered access to the refrigerated vans precarious and dangerous and thus unseaworthy.

(A-3). Sea-Land never challenged this finding of fact on appeal. The District Court also found that Sea-Land was responsible for the unseaworthy condition:

> The installation of a catwalk to the stacking frame supporting the third tier was shoreside work and was not part of plaintiff's responsibility or duties. (A-4).

Similarly, Sea-Land never challenged this finding of fact on appeal.

The District Court found that the unseaworthy condition proximately caused Tinsley's injuries and awarded $721,673.00 in damages. Sea-Land appealed claiming that Tinsley had breached an alleged primary duty by not reporting that catwalks were needed and in failing to specifically request catwalk installation. Sea-Land's argument that Tinsley should be barred from recovery in this

case was rejected by the District Court and also by the Court of Appeals. Sea-Land's contention was that certain factual findings as entered by the District Court were clearly erroneous. The Ninth Circuit respectfully and comprehensively disagreed.

Nonetheless, on the first appeal Tinsley was found to be comparatively negligent as a matter of law by the Ninth Circuit for his failure to report the unseaworthy condition. The case was remanded to the District Court for an apportionment of liability between Sea-Land and Tinsley. The Ninth Circuit did so subject to the following admonition:

> [W]e emphasize, however, that our opinion should not be read to express a view on what amount of reduction is appropriate. The District Court shall examine this question independently. (A-32-33)

Following the hearing on remand, the District Court apportioned liability 10% to Mr. Tinsley and 90% to Sea-Land.

Sea-Land once again appealed to the Ninth Circuit and made all of the same arguments to that Court (attacking the District Court's factual findings in support of its apportionment of damages as clearly erroneous (A-51 to A-58)) that it is now making in the Supreme Court. The Court of Appeals concluded that the District Judge's apportionment of liability was not clearly erroneous and affirmed the same.

The Ninth Circuit also concluded on appeal that post judgment interest should run from the date of the initial

entry of judgment because on appeal Sea-Land had never questioned the amount of damages, focusing only on liability. Damages were fully and finally ascertained at the conclusion of the first trial and only later reduced for 10% comparative fault. The Ninth Circuit's remand following the first appeal was expressly limited to the issue of apportionment of fault. All damage findings by the District Court were upheld (A-24-25, A-32-33). As stated by the Ninth Circuit:

> On remand, the district court shall determine the extent for which Sea-Land's liability is offset by Tinsley's negligence, and shall reduce the damage award *already calculated* according to the percentage of his fault. (Emphasis added, A-32).

This is precisely what the District Court did.

SUMMARY OF ARGUMENT

Applying the standards of Supreme Court Rule 10, none of the issues which Sea-Land raises in its Petition merit this Court granting a Writ of Certiorari. Sea-Land tries to dress its Petition for Writ of Certiorari up as one involving important issues of maritime law and as a case requiring the Supreme Court to correct the United States Court of Appeals for the Ninth Circuit's interpretation of a recent Supreme Court decision, namely, *Kaiser Aluminum & Chemical Corp. v. Bonjorno,* 494 U.S. 827, 110 S.Ct. 1570 (1990). Sea-Land's arguments, all of which are at bottom factual in nature, have been aired and rejected *ad nauseum* by both the District Court and by two separate panels of the Ninth Circuit.

The Ninth Circuit's published opinion on the post judgment interest issue, *Tinsley v. Sea-Land Corp.*, 979 F.2d 1382 (9th Cir. 1992), is in complete harmony with the Supreme Court's recent opinion on the matter, *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827 (1990), and, contrary to Sea-Land's assertion, there is no conflict in the circuits regarding this issue. For these reasons, Sea-Land's Petition for a Writ of Certiorari should be denied.

ARGUMENT

1. The Primary Duty Rule is Inapplicable.

The Ninth Circuit considered the so-called "primary duty" defense at length (A-16-A-22). The Ninth Circuit based upon a careful review of the evidence and following its most recent and well-reasoned formulation of the rule in *California Home Brands, Inc. v. Farrieira*, 871 F.2d 830, 836 (9th Cir. 1989) – a case curiously omitted from Sea-Land's petition – declined to apply the primary duty rule.

As stated by the Ninth Circuit on the first Tinsley appeal:

> "[i]n order for the primary duty rule to apply, the employee must have failed to perform a *specific, positive* duty for which he had *primary* responsibility." *Id.* at 836 n.3 (emphasis added to the word "specific"). Drawing on *Walker* and *Dixon*, the court made clear that the duty alleged must be specific. As Learned Hand explained in *Walker*, the duty must be "consciously assumed as a term of employment."

> *Walker*, 193 F.2d at 773. According to Judge (later Justice) Harlan, the duty must be so clearly delineated that, if breached, the employer would have a cause of action against the employee. *Dixon*, 219 F.2d at 16-17.
>
> By contrast, plaintiff in the present case was told in a highly generalized way that he was responsible for maintaining a safe ship. He was never instructed to make reports detailing where he perceived catwalks were needed. The primary duty rule covers only those situations where the failure to undertake an explicitly assigned duty backfires on the very person who was inattentive to it – where the connection between the seaman's negligence and his own mishap is so strong as to justify a total bar to recovery.
>
> If we were to accept Sea-Land's position, seamen with broad responsibilities like plaintiff would rarely recover in tort; ironically, they would be responsible for nearly every unseaworthy condition causing them harm. Moreover, ship owners would have an incentive to broadly define the duties of their seamen, with the effect that an assumption of risk standard would begin to prevail in maritime law. Such an outcome would contradict the basic principle that a ship owner's duty to provide a seaworthy ship is absolute and nondelegable.

(A-20-21).

The Ninth Circuit's analysis was correct and does not warrant review by the Supreme Court.

2. Sea-Land Only Seeks To Overturn the District Court's Factual Findings Which Were Affirmed by the Ninth Circuit. Therefore, the Petition for Writ of Certiorari Should be Denied.

A Writ of Certiorari should be granted only when there are overriding issues of general public importance or the need to secure uniformity of federal law. Wright, Miller & Cooper, *Federal Practice and Procedure,* Section 4004 (1977). It is well settled that the Supreme Court does "not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnson,* 268 U.S. 220, 227 (1925). In particular, "the ordinary negligence case under the Federal Employer's Liability Act does not satisfy the criteria that define the 'special and important reasons' when a Writ of Certiorari will be granted[.]" *Ferguson v. Moore-McCormack Lines,* 352 U.S. 521, 532 (1957) (Justice Frankfurter, dissenting). Contrary to Sea-Land's position, this is just such a garden-variety seaman's case. The factual nature of Sea-Land's Petition is amply demonstrated by a review of its brief. Pages 8 to 16 deal directly with the factual background and merely reiterate Sea-Land's factual contentions in the District Court. Sea-Land's factual contentions in large measure were rejected by the District Court and twice by the Court of Appeals.

Sea-Land attempts to dress its factual argument up as one involving an issue of law concerning the various duties of a chief mate and ship owner. Sea-Land employs this tactic because the apportionment of fault in a maritime case is a question of fact and is subject to the clearly erroneous standard of review. See *U.S. Fire Ins. Co. v. Allied Towing Corp.,* 966 F.2d 820, 823 (4th Cir., 1992) (apportionment of liability in a maritime case reviewed

for clear error). In the final analysis, Sea-Land is asking the Supreme Court to reexamine and reweigh the evidence adduced at trial. This is not the Supreme Court's role and never has been.

3. The Ninth Circuit's Decision is Thoroughly Consistent with *Kaiser Aluminum & Chemical Corp. v. Bonjorno.*

In *Kaiser Aluminum & Chemical Corp. v. Bonjorno,* 494 U.S. 827, 836, 110 S.Ct. 1570, 1576 (1990), the Supreme Court stated:

> Where the judgment on damages was not supported by the evidence, the damages have not been 'ascertained' in any meaningful way.

If the damages have not been properly ascertained, then post judgment interest cannot run from the date of entry of the first judgment. At the first *Bonjorno* trial, the District Court entered a directed verdict in favor of Kaiser. The Court of Appeals for the Third Circuit then reversed, holding that there was sufficient evidence for the case to go to the jury. *Columbia Metal Culvert Company, Inc., v. Kaiser Aluminum & Chemical Corp.,* 579 F.2d 20, 37 (3rd Cir. 1978). In 1979, a second trial resulted in a jury verdict in the plaintiffs' favor in the amount of $5,445,000. The District Court, however, held that the evidence did not support the jury's damage award and granted a motion for a new trial as to damages. *Bonjorno v. Kaiser Aluminum & Chemical Corp.,* 518 F. Supp. 102, 109, 119 (1981). On retrial, the jury on December 2, 1981, awarded treble damages in the amount of $9,567,939. This judgment was

ultimately affirmed by the Third Circuit. *Bonjorno v. Kaiser Aluminum & Chemical Corp.*, 752 F.2d 802, 815 (3rd Cir. 1984). The issue before the Supreme Court was simply whether or not the plaintiff was entitled to interest from the date of the 1979 judgment which was set aside in its entirety for insufficient evidence or from the date of the 1981 judgment which was ultimately affirmed.

The Supreme Court held in *Bonjorno,* 110 S.Ct. at 1576,

> Where the judgment on damages was not supported by the evidence, the damages had not been "ascertained" in any meaningful way.

Therefore, the Supreme Court concluded that interest should begin to run only from the date when the damages were "ascertained", pointing out that post-judgment interest may not be calculated from a damage judgment that was completely reversed *Bonjorno,* 110 S.Ct. at 1576 (*citing FDIC v. Rocket Oil Co.*, 865 F.2d 1158 (10th Cir. 1989)).

In Tinsley, not only were the damages fully ascertained and established on March 24, 1989 when the District Court entered judgment, but the Ninth Circuit in its memorandum *per curiam* opinion specifically affirmed the damage award, remanding solely for a determination of the percentage that Tinsley was at fault for failing to report the unseaworthy condition. (A-32, 33) To reiterate, the Ninth Circuit affirmed the trial court's damage award in Tinsley. In *Bonjorno,* the 1979 damage award was reversed and never reinstated. A new trial was held on damages resulting in a second verdict in 1981, the date from which interest properly ran.

The Ninth Circuit in *Tinsley v. Sea-Land Corp.*, 979 F.2d 1382 (9th Cir., 1992), held that Tinsley's damages were fully and completely ascertained at trial. This was the correct conclusion because Sea-Land never attacked the quantum of damages, instead it merely argued that it was not liable for any damages whatsoever as a matter of law and/or that the judgment should be reduced based upon Tinsley's comparative fault. After the first appeal, the case was remanded to the District Court for a hearing on apportionment of comparative fault only (not a new trial on damages) and the District Court apportioned fault 90% against Sea-Land and 10% against Tinsley. The amount of the judgment which had originally been entered was therefore reduced by 10%. Sea-Land was only required to pay post judgment interest on the amount of the award that stood after the reduction for comparative negligence and Sea-Land cannot argue that it is prejudiced in any manner. Tinsley's damages were fully ascertained at the conclusion of the initial trial and Sea-Land paid post judgment interest on that amount exactly as intended and required by 28 U.S.C. § 1961.

There is no conflict among the circuits and there is absolutely nothing whatsoever in the instant Petition which requires or even justifies the Supreme Court's attention. In fact, the Ninth Circuit's decision in *Tinsley v. Sea-Land Corp.*, 979 F.2d 1382 (9th Cir., 1992), is in complete harmony with the First and Eighth Circuit's post-*Bonjorno* decisions. *H. J., Inc. v. Flyato Corp.*, 925 F.2d 257, 261-62 (8th Cir., 1991); *Cordero v. DeJesus-Mendez*, 922 F.2d 11, 15-18, 20 (1st Cir., 1990).

CONCLUSION

Plaintiff suffered what turned out to be a career-ending injury on September 5, 1987, and is currently 65 years old. In summary, he has waited almost six years for the wheels of justice to painstakingly turn in his favor through two district court trials, two separate appeals and two petitions for rehearing. Again, enough is enough.

Sea-Land's petition is totally without merit. Respondents respectfully request a prompt denial.

DATED this 17 day of June, 1993.

Respectfully submitted,

RONALD J. BLAND
Counsel of Record
SAM L. LEVINSON
LEVINSON, FRIEDMAN, VHUGEN,
DUGGAN & BLAND
600 University Street
Suite 2900
Seattle, WA 98101
(206) 624-8844
Attorneys for Respondents